No. 84706

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IN THE
MISSOURI SUPREME COURT

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SHERYL L. WYRECK-HAAKE,

Appellant,

v.

STATE OF MISSOURI,

Respondent.

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Appeal from the Circuit Court of Ray County, Missouri
The Honorable Werner A. Moentmann, Judge

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RESPONDENT'S SUBSTITUTE STATEMENT, BRIEF AND ARGUMENT

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JURISDICTIONAL STATEMENT

This appeal is from the denial of a motion to vacate judgment and sentence under Supreme Court Rule 24.035 in the Circuit Court of Ray County. The conviction sought to be vacated was for first degree statutory rape, §566.032, RSMo 2000[1], first degree statutory sodomy, §566.062, and first degree endangering the welfare of a child, §568.045, for which the sentence was seventeen years on the statutory sodomy and rape charges and three years on the endangering the welfare of a child charges. The Missouri Court of Appeals, Western District, affirmed appellant's conviction and sentence per order and unpublished memorandum opinion. ***State v. Wyreck-Haake***, No. WD59803 (Mo.App.W.D., June 11, 2002). It denied appellant's motion for rehearing on July 30, 2002.

This appeal does not involve any of the categories reserved for the exclusive appellate jurisdiction of the Supreme Court of Missouri. On October 22, 2002, pursuant to Supreme Court Rules 30.27 and 83.04, this case was transferred to this Court. Therefore, this Court now has jurisdiction of this appeal pursuant to Article V, §10, Missouri Constitution (as amended 1982).

[1]All statutory citations are to RSMo 2000 unless otherwise noted.

STATEMENT OF FACTS

Appellant, Sheryl Leann Wyreck-Haake, was charged by information with two counts of first degree statutory sodomy, one count of statutory rape, two counts of first degree endangering the welfare of a child, and four counts of second degree child molestation (LF 1, 12-17). An amended information was subsequently filed (LF 3, 6-11). On November 2, 1999, appellant appeared before the Honorable Werner A. Moentmann in the Circuit Court of Ray County and pled guilty to the two counts of statutory sodomy and the statutory rape charge, and entered an Alford plea of guilty to the counts of endangering the welfare of a child (LF 3-4, 40). The four counts of second degree child molestation were nolle prossed (LF 8-9, 14-15; Tr. 55).

Appellant understood the charge against her (LF 18). Appellant understood the range of punishment for the offense of which she was charged (LF 19, 31). She understood that she was waiving her right to a trial and all other rights appurtenant thereto (LF 18-19, 38-40). She understood that the court would assess the punishment (LF 19). She had not been threatened, intimidated, or mistreated in order to cause her to plea guilty (LF 18, 40). She had had the opportunity to discuss the facts surrounding the case with her attorney and with family and friends and did not need additional time to do so (LF 19, 35). Appellant indicated that she was satisfied with her attorney's advice and was satisfied in every respect with his representation (LF 19).

Appellant understood that the terms of the plea bargain were 17 years on each of the sodomy counts and the rape counts, said sentences to run concurrently with each other, and three years on the endangering the welfare of a child counts, said sentences to run concurrently with each other, but consecutive to the 17 year sentences (LF 19, 30). Appellant understood that the prosecutor would

recommend a 120 day callback provision and that defense counsel would argue for probation (LF 19, 30-31). Appellant understood that the court would decide whether to give her probation or not (LF 30). Appellant understood that the trial court was not bound by the plea agreement, did not have to accept or honor the plea bargain, and could assess a punishment greater or less than the plea bargain agreement (LF 19, 31). Appellant understood that the plea bargain was only a recommendation and that she did not have a right to withdraw her guilty plea if the trial court did not accept it or did not give appellant probation as argued for by counsel (LF 19, 31).

If the case had gone to trial, the evidence would have shown that on March 24, 1999 and March 28, 1999, in Ray County, appellant engaged in deviate sexual intercourse, oral sex, with Trac Hendrix, who was under 14 years of age at the time (LF 32, 37). One of these acts occurred at appellant's home, the other in her car (LF 33). On March 26, 1999, in Ray County, appellant engaged in sexual intercourse with Trac Hendrix, who was under 14 years of age at that time (Tr. 32, 37). This act occurred in appellant's car (LF 33). Appellant admitted to these facts (LF 32). Appellant also acknowledged that if the case went to trial, the state would prove that on March 25, 1999, while at school where she was employed as a teacher's aide, she had contact with her hand to Trac Hendrix's genitals and that, as an employee of the school district, she was a person charged with Hendrix's care (LF 33, 38). A similar incident occurred on March 26, 1999 (LF 33, 38). Appellant acknowledged that this would be the state's evidence and that she would probably be convicted on the endangering counts if the case went to trial (LF 33-34, 38).

The court found appellant's plea to have been voluntarily made with a full understanding of her constitutional rights and the consequences of such a plea (LF 40). The court ordered a presentence investigation (LF 4, 40). Sentencing was deferred until January 11, 2000 (LF 4). At the sentencing

hearing, the state's recommendation was that appellant be sentenced only on the endangering counts, that appellant be sentenced to concurrent sentences of three years on those charges, and appellant be given 120-day shock probation on those counts under §559.115 (LF 46, 106). The state said that if the Court did recall appellant, the state would recommend straight probation on the statutory rape and sodomy charges, backed up by sentences of 17 years concurrent on the statutory rape and sodomy charges (LF 46; Tr. 39). The state would also recommend straight probation on the longer sentences (LF 47).

Appellant indicated that she understood that that would be the state's recommendation and that it was only a recommendation (LF 47). Appellant understood that the Court was not bound by the recommendation and could impose a greater or lesser sentence than that recommended by the prosecutor (LF 48). Appellant also understood that if the Court did not follow the recommendation, she would not be allowed to withdraw her guilty plea (LF 48). Appellant said that she wished to continue with her guilty plea (LF 48). Appellant understood that the trial court had the option of bringing her back after 120 days of incarceration but did not have to exercise that option (LF 64). The trial court ruled that it did not feel that a 120-day call back or probation was appropriate under the circumstances of the case (LF 102). The court also found that the statutes do not provide for a 120-day call back in instances of statutory sodomy or statutory rape (LF 101-102). The trial court sentenced appellant to seventeen years on each of the statutory sodomy counts and on the rape count, and to three years on each of the endangering the welfare of a child count (LF 4, 21-24, 102-103). The seventeen year prison sentences were run concurrently to each other, and the three year sentences were run concurrently with each other, but consecutively to the 17 year sentences (LF 5, 21-24).

Defense counsel observed that it had been the recommendation of the state that appellant be sentenced that day only on the endangering the welfare of a child counts, and that she then be returned for a decision regarding the seventeen-year sentences on the other charges (LF 106). Defense counsel was concerned that if the court did not follow these recommendations, the court would not have the authority to bring appellant back before it, and she would have to serve 85 percent of her sentence before being eligible for parole (LF 106). The court observed that the 85% rule did not apply to statutory sodomy or rape convictions and that the normal probation and parole guidelines applied (LF 106). After sentencing, appellant still stated that she had no complaints about counsel's services (LF 105).

Appellant timely filed a *pro se* motion for postconviction relief under Supreme Court Rule 24.035 (LF 109-114). Counsel subsequently filed an amended motion on appellant's behalf (LF 121-137). An evidentiary hearing was held. To avoid unnecessary repetition, any facts adduced at appellant's evidentiary hearing, to the extent relevant to appellant's claims, are set out as necessary in respondent's argument, ***infra***. On February 27, 2001, the trial court issued an order and findings denying appellant's motion for postconviction relief (LF 174-182).

The Missouri Court of Appeals, Western District, affirmed appellant's conviction and sentence via order and unpublished memorandum opinion. ***State v. Wyreck-Haake***, No. WD59803 (Mo.App.W.D. June 11, 2002). It denied appellant's motion for rehearing on July 30, 2002. On October 22, 2002, pursuant to Supreme Court Rules 30.27 and 83.04, this Court granted appellant's motion to transfer the case to this Court.

ARGUMENT

I.

THE MOTION COURT DID NOT CLEARLY ERR IN DENYING APPELLANT'S RULE 24.035 MOTION, IN WHICH SHE ALLEGED THAT HER PLEA ATTORNEY WAS INEFFECTIVE FOR ADVISING HER TO ACCEPT A PLEA AGREEMENT WHICH CONTAINED A NON-BINDING SENTENCE RECOMMENDATION AND FOR PURPORTEDLY LEADING HER TO BELIEVE THAT THE NON-BINDING RECOMMENDATION WOULD BE FOLLOWED, BECAUSE COUNSEL'S ADVICE WAS A MERE PREDICTION OF WHAT THE COURT WOULD DO AND WHAT HER SENTENCE WOULD BE, APPELLANT REPEATEDLY INDICATED ON THE RECORD THAT SHE UNDERSTOOD THAT THE TRIAL COURT DID NOT HAVE TO FOLLOW THE NON-BINDING RECOMMENDATIONS WITHIN THE PLEA AGREEMENT, AND THERE IS NOTHING INEFFECTIVE ABOUT DEFENSE COUNSEL RECOMMENDING A PLEA AGREEMENT WHICH CONTAINS A NON-BINDING SENTENCE PROVISION IN THAT SUCH A PROVISION IS A PERFECTLY PERMISSIBLE PLEA ALTERNATIVE UNDER STATE AND FEDERAL LAW.

Appellant contends that the motion court erred in denying her Rule 24.035 motion because, according to appellant, her plea attorney, in essence, was *per se* ineffective for recommending that she enter into a "non-binding plea agreement" because said agreements purportedly "provide no benefits in exchange for a defendant's sacrifice of his or her right to a trial," "strip defendants of the right to withdraw their plea if the agreement is not followed, and "render defendants' please unknowing, unintelligent and

involuntary . . . by creating the illusion" that the terms of the plea agreement would be followed (App.Br. 25).

A. Standard of Review.

Appellate review of the denial of a post-conviction motion is limited to the determination of whether the findings of fact and conclusions of law are "clearly erroneous." ***State v. Tokar***, 918 S.W.2d 753, 761 (Mo. banc 1996), *cert. denied* 117 S.Ct. 307 (1996); Supreme Court Rule 24.035(k). Findings of fact and conclusions of law are clearly erroneous only if, after a review of the entire record, the court is left with the definite and firm impression that a mistake has been made. ***State v. Taylor***, 929 S.W.2d 209, 224 (Mo. banc 1996), *cert. denied* 117 S.Ct. 1088 (1997). On review, the motion court's findings and conclusions are presumptively correct. ***Wilson v. State***, 813 S.W.2d 833, 835 (Mo. banc 1991).

To show ineffective assistance of counsel, appellant must show that his counsel "failed to exercise the customary skill and diligence that a reasonably competent attorney would perform under similar circumstances," ***Strickland v. Washington***, 466 U.S. 668, 689, 104 S.Ct. 2052, 2065, 80 L.Ed.2d 674 (1984), and that he was prejudiced by his counsel's failure to competently perform. ***Id.*** Prejudice exists when there is a reasonable probability that, but for counsel's ineffectiveness, the result would have been different. ***Strickland,*** 466 U.S. at 694, 104 S.Ct. at 2068. Where a defendant pleads guilty, claims of ineffective assistance of counsel are only relevant as they affect the voluntariness and understanding with which the plea was made. ***Hicks v. State***, 918 S.W.2d 385, 386 (Mo.App. E.D. 1996).

B. Facts.

Appellant was initially charged with two counts of first degree statutory sodomy, one count of first degree statutory rape, two counts of endangering the welfare of a child in the first degree, and four counts

of second degree child molestation (PCRLF 6-9). The original plea agreement in this case was that in exchange for her plea, the state would recommend sentences of 17 years on the statutory rape and sodomy charges and 3 years on the endangering the welfare of a child counts and would recommend that appellant be given probation after 120 days incarceration under the terms of §559.115, RSMo 2000, but that this recommendation for probation would be non-binding on the trial court.

Immediately prior to the plea hearing, the attorneys discovered that appellant could not be eligible for the 120 day call-back provision because §559.115.5 specifically states that that provision is not available for statutory rape and statutory sodomy charges. The plea agreement was then altered so that the state would recommend that appellant be sentenced only on the endangering the welfare of a child counts, that the state would recommend that appellant receive three years for those counts, but that appellant be called back after 120 days and granted probation under §559.115, and that sentencing on the other counts would be deferred until appellant was called back after 120 days. The state would further recommend that when appellant was called back, the court would then sentence her on the statutory rape and statutory sodomy charges, giving her sentences of seventeen years on each of them, but suspending execution of the sentences and granting her probation.

Appellant understood that the court would assess the punishment (LF 19). She had had the opportunity to discuss the facts surrounding the case with her attorney and with family and friends and did not need additional time to do so (LF 19, 35). Appellant understood that the terms of the plea bargain were 17 years on each of the sodomy counts and the rape counts, said sentences to run concurrently with each other, and three years on the endangering the welfare of a child counts, said sentences to run concurrently with each other, but consecutive to the 17 year sentences (LF 19, 30). Appellant understood that the

prosecutor would recommend a 120 day callback provision and that defense counsel would argue for probation (LF 19, 30-31). Appellant understood that the court would decide whether to give her probation or not (LF 30). Appellant understood that the trial court was not bound by the plea agreement, did not have to accept or honor the plea agreement, and could assess a punishment greater or less than the plea bargain agreement (LF 19, 31). Appellant understood that the plea agreement was only a recommendation and that she did not have a right to withdraw her guilty plea if the trial court did not accept it or did not give appellant probation as argued for by counsel (LF 19, 31).

The court found appellant's plea to have been voluntarily made with a full understanding of her constitutional rights and the consequences of such a plea (LF 40). The court ordered a presentence investigation (LF 4, 40). Sentencing was deferred until January 11, 2000 (LF 4). At the sentencing hearing, the state's recommendation was that appellant be sentenced only on the endangering counts, that appellant be sentenced to concurrent sentences of three years on those charges, and appellant be given 120-day shock probation on those counts under §559.115 (LF 46, 106). The state said that if the Court did recall appellant, the state would recommend straight probation on the statutory rape and sodomy charges, backed up by sentences of 17 years concurrent on the statutory rape and sodomy charges (LF 46, 47; Tr. 39).

Appellant indicated that she understood that that would be the state's recommendation and that it was only a recommendation (LF 47). Appellant understood that the Court was not bound by the recommendation and could impose a greater or lesser sentence than that recommended by the prosecutor (LF 48). Appellant also understood that if the Court did not follow the recommendation, she would not be allowed to withdraw her guilty plea (LF 48). Appellant said that she wished to continue with her guilty

plea (LF 48). Appellant understood that the trial court had the option of bringing her back after 120 days of incarceration but did not have to exercise that option (LF 64). At the close of the hearing, the trial court ruled that it did not feel that a 120-day call back or probation was appropriate under the circumstances of the case (LF 102). The trial court sentenced appellant to seventeen years on each of the statutory sodomy counts and on the rape count, and two three years on each of the endangering the welfare of a child count (LF 4, 21-24, 102-103). The seventeen year prison sentences were run concurrently to each other, and the three year sentences were run concurrently with each other, but consecutively to the 17 year sentences (LF 5, 21-24).

An evidentiary hearing was held on appellant's Rule 24.035 motion, at which appellant's plea counsel, Martin Warhurst, testified (Tr. 7, *et seq.*). Warhurst knew that the state's plea offer was not binding on the court (Tr. 10). He conferred with the local public defender about whether Judge Moentmann typically followed the prosecutor's recommendations in plea agreements (Tr. 10). Warhurst discussed the plea offer on several occasions with appellant (Tr. 11). Warhurst explained that the prosecutor would recommend the 120-day call back on the 20-year sentence, but ultimately it would be up to the judge what sentence she served (Tr. 11). Warhurst told appellant that he believed it likely that she would receive the 120-day call back (Tr. 12). Although he did not quantify the chances, he did tell appellant it was unlikely that the court would give her the twenty year sentence (Tr. 12). Warhurst believed it was likely that the court would go along with the prosecution's recommendations because such recommendations are often persuasive to the court, the record reflected that appellant allegedly felt remorse and that appellant had a clean record, and that the 120-day call back was therefore appropriate (Tr. 24).

Warhurst never guaranteed appellant that she would get the plea bargain (Tr. 25-26). Warhurst never represented that what he felt likely to happen would, in fact, happen (Tr. 26).

The motion court found that appellant had entered her guilty pleas "with a full understanding of the circumstances surrounding the plea agreement" and that appellant "was fully aware that the Court need not follow the recommendations of the State as to sentencing, and further, that [appellant] would not be permitted to withdraw her pleas of guilty in the event the Court determined to grant sentences greater than, or less than those recommended by the State and that use of the statutory 120 day rule was within the total and absolute discretion of the Court and that the recommendations of the State regarding all aspects of the plea agreement and recommendations were non-binding upon the Court." (LF 177-178).

C. Counsel was not ineffective for recommending a plea with a non-binding sentencing recommendation as to probation.

In her brief before the court of appeals, appellant contended that her guilty plea was not made knowingly and intelligently because counsel allegedly did not inform her that there was a real risk that the trial court would decide not to grant her probation but instead would sentence her. In essence, she claimed that she would never have pled guilty if she had thought there was any chance that the trial court would not follow the non-binding probation recommendation provision of the plea agreement.

Appellant has shifted her theory to some extent before this Court in that now she acknowledges that she had received the warnings and advice necessary under the relevant caselaw, as discussed below, regarding the fact that the probation recommendation was non-binding on the court (App.Br. 38, 44-45). Appellant's argument now is essentially that to recommend a plea agreement which contains a non-binding recommendation as one of its provisions is *per se* ineffective assistance on the part of defense counsel and

that such an agreement, by necessity, renders a plea involuntary, unknowing, and unintelligent. Simply put, in appellant's view, no defendant anywhere could ever knowingly and intelligently and voluntarily agree to a non-binding provision within a plea agreement . Thus, appellant now asks this Court for the first time to overrule Missouri caselaw which provides for non-binding sentencing recommendations and, of course, to vacate her own convictions and sentences (App.Br. 65).

To begin with, appellant in her brief and respondent in its brief below repeatedly use the term "nonbinding plea agreement," but this is a misnomer. The accurate term for what is at issue is a "non-binding sentencing recommendation" that the parties have agreed to make part of a plea agreement, and the term "non-binding" means only that if the trial court does not follow the recommendation that is deemed "non-binding," it is not required to allow the defendant to withdraw his or her plea. ***Harrison v. State***, 903 S.W.2d 206, 209, n.2 (Mo.App.W.D. 1995).

In ***Harrison v. State***, the defendant pled guilty to five out of twenty felony counts originally charged. In exchange for this plea, the state agreed to dismiss the fifteen other counts and make a non-binding recommendation that the sentences be served concurrently. ***Id.*** Despite the state's recommendation, the trial court sentenced the defendant to consecutive terms of imprisonment. ***Id.***

The defendant argued that the sentencing court violated Rule 24.02 by not allowing her to withdraw her guilty pleas. ***Id.*** The defendant also relied on ***Schellert v. State***, 569 S.W.2d 735 (Mo.banc 1978), as appellant does here. In ***Schellert***, this Court found that if the court rejects the plea agreement, the court shall inform the parties of that fact, advise the defendant in open court that the trial court is not bound by the agreement, and allow the defendant to withdraw his plea. ***Id.*** at 739.

The Court of Appeals, Western District, noted that under this Court's decision in ***Schellert***, a defendant must be allowed to withdraw her plea when a sentence concession has been negotiated, and the court decides not to follow the State's recommendation.[2] ***Harrison, supra.*** The Court of Appeals went on to observe that at first blush, it would appear that the sentencing court had violated Rule 24.02, which was based on this Court's holding in ***Schellert***. ***Harrison, supra*** at 208. However, the Court of Appeals drew a distinction between a "plea agreement" and a "non-binding recommendation," noting that the difference involves "the issue of whether the agreement includes a genuine sentence concession." ***Id.*** Unlike the facts in ***Schellert,*** the facts in ***Harrison*** show that all parties knew that the state would be making a "non-binding recommendation" – "non-binding" in the sense that the court would not have to allow the defendant to withdraw his plea if the court did not follow the prosecutor's recommendation. The Court of Appeals found no issue of "substantial fairness" nor a denial of sentenced concessions in that the defendant obtained the dismissal of the counts she bargained for and that it was within the parameters of the agreement between the prosecution and defendant that it was only making a non-binding recommendation that the trial court was free to reject without allowing her to withdraw her plea. ***Id.*** at 209-210. Simply put, the parties *agreed* that the recommendation would be non-binding and that the trial court was free to reject the recommendation without having to let the defendant withdraw her plea.

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[2]This Court's holding in ***Schellert*** has been embodied in Supreme Court Rule 24.02(d)(4), which states that if the trial court rejects the plea agreement, the court shall inform the parties and afford the defendant the opportunity to withdraw his plea.

Other Missouri cases have also recognized the use of non-binding sentence recommendations as part of a plea bargain.[3] ***See Comstock v. State***, 68 S.W.3d 561 (Mo.App.W.D. 2001) (affirming non-binding sentence recommendation); ***Simpson v. State***, 990 S.W.2d 693 (Mo.App.E.D. 1999) (recognizing that plea agreement may include provisions for non-binding recommendations, but reversing because record reflected a true plea agreement, not a non-binding recommendation); ***Stufflebean v. State***, 986 S.W.2d 189 (Mo.App.W.D. 1999) (affirming use of non-binding sentence recommendation as provision of plea agreement); ***Good v. State***, 979 S.W.2d 196 (Mo.App.W.D. 1998) (recognizing use of non-binding recommendations, but reversing because under "unique circumstances" of case, it was not clear that defendant understood).

The federal courts also allow for a non-binding sentence recommendations as part of plea bargains. Federal Rule of Criminal Procedure 11(e)(1)(B) expressly provides that the prosecutor and attorney for defendant may agree that upon defendant's entering a plea of guilty, the prosecution will "*recommend*, or agree not to oppose the defendant's request for *a particular sentence* or sentencing range, or that a particular provision of the Sentencing Guidelines, or policy statement, or sentencing factor is or is not applicable to the case. *Any such recommendation or request is not binding on the court*." (Emphasis added). ***See, e.g., White v. United States***, 308 F.3d 927 (8th Cir. 2002); ***United States v. Rhodes***, 253 F.3d 800 (5th Cir. 2001);***United States v. Schmader***, 650 F.2d 533 (4th Cir. 1981)

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[3]Appellant, in an appendix to her brief, cites data gathered from an informal poll of district public defenders as to which Missouri judicial circuits use "non-binding plea agreements." (App.Brf. 36). This evidence is not properly part of the record and is improper hearsay evidence and should be disregarded. Respondent has filed a motion to strike appellant's appendix for these reasons.

cert. denied, 454 U.S. 898 (1981); ***United States v. Henderson***, 565 F.2d 1119 (9th Cir. 1977), *cert. denied*, 435 US 955 (1978).

Despite the fact that agreements such as that in appellant's case are permissible under Missouri law, indeed despite the fact that such agreements are expressly provided for by the Federal Rules of Criminal Procedure, which as drafted conformed to the ABA Standards Relating to Pleas of Guilty §1.5 (Notes of Advisory Committee on 1979 amendments to Federal Rule of Criminal Procedure 11), appellant insists that such agreements are unfair (App.Br. 36-37).

Appellant asserts that the agreements "obfuscate[], malign[], and damage[] the clear and fair parameters of plea bargain agreements contemplate ***Schellert***." (App.Br. 36). They do not. At the heart of ***Schellert***'s holding is the principle of fairness – that plea bargaining be conducted so that the terms agreed upon by both sides be upheld. "If plea bargaining is to fulfill its intended purpose, it must be conducted fairly on both sides and the results must not disappoint the reasonable expectations of either." ***Schellert, supra***, at 739 (citation omitted). Thus, if the parties agree to a certain genuine sentence concession on the part of the state, then clearly the defendant is entitled to see that concession granted or be allowed to withdraw from the plea agreement because he agreed to plea in exchange for a genuine sentence concession. But where the parties, as part of the agreement, *agree* that any given recommendation will not bind the court, and where the parties know and understand that that is what they have agreed to, then both parties – defendant and the state – are equally entitled to have that provision enforced as part of the agreement. A defendant cannot complain that a plea agreement is fundamentally unfair when *the terms he or she agreed to* are upheld.

In ***Schellert***, the defendant did not agree as part of his plea bargain that the sentencing recommendation would not be binding on the court. But in appellant's case, she agreed that the recommendation would not be binding. There are no grounds under ***Schellert*** or any other authority to hold that it is fundamentally unfair to uphold the terms of a plea agreement that appellant knowingly and voluntarily agreed to.

Appellant asserts that the agreements mislead defendants into believing they have "improved their chances for a lesser sentence." (App.Br. 36).

This is not true. Defendants who enter into such agreement have improved their chances for a lesser sentence. Certainly if the prosecutor recommends a lesser sentence, there is a greater chance that the defendant will receive this benefit than if the prosecutor had made no such recommendation. The defendant *knows* that this recommendation is not a guarantee because the defendant *agreed* that the recommendation would not be binding on the court and thus the court would not have to go along with it. The defendant knows it is not a guarantee but agrees because he stands a better chance of getting the sentence recommendation if the prosecutor stands behind it than he would if the prosecutor said nothing at all. Since the defendant knows it is not a guarantee, it cannot be said that the defendant is misled into anything simply because he agreed to a non-binding sentencing recommendation.[4]

Furthermore, in the present case, appellant – even though she did not get probation as she hoped – did get substantial sentencing benefits as a result of the agreement. Appellant faced up to three life sentences on the statutory rape and statutory sodomy charges, two five year sentences on the endangering

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[4]Obviously, defendants *can* be misled into agreeing to a plea bargain if, for example, counsel assures them or promises them a certain result. As will be discussed below, this is not the case here.

the welfare of a child charges, and four one-year sentences on the child molestation charges. In return for her plea, as she had bargained for, the child molestation charges were dropped, she received only three year sentences on the endangering counts, and only 17 years on the statutory sodomy and rape charges, resulting in a total sentence of 20 years.

Appellant contends that defendants who enter into such plea agreements face the same consequences they would face if they persisted in their pleas of not guilty and proceeded to trial (App.Br. 36). Again, this is not true. First of all, the defendant actually has the advantage of the prosecution to a certain extent advocating on his or her behalf for a lesser sentence or probation or concurrent sentences, etc. This, while not a guarantee, is certainly an advantage that a defendant would not have at trial.

Secondly, defendants who enter into open pleas or blind pleas do not get the advantage of the state recommending a lower sentence. Persons making an open plea or blind plea are arguably at more of a disadvantage then persons entering into a plea such as appellant's. Does this mean that defendants should not be allowed the opportunity to "throw themselves upon the mercy of the court?" Should this option simply be eliminated and defendants be forced to go through a jury trial?

Finally, it must be remembered that there are other motivations for pleading guilty rather than going to trial. Defendants may not wish to go through the time, the stress, the expense, the embarrassment, or the notoriety and publicity of going to trial. They may not wish to put their families and friends through the ordeal. They may not wish to put the victim through the ordeal. They may simply want to own up and take responsibility for whatever crime they committed.

As appellant herself notes, defendants are not entitled to plea offers from the State (App.Br. 28). But if the State does make an offer – even if that offer happens to include a non-binding recommendation

–, surely a defendant is entitled to agree to it if he believes it may be to his benefit. As long as that defendant knows and understands the consequences of the agreement, he should be able to accept it if he wishes.

In short, agreements such as that in appellant's case are not *per se* unfair. They benefit defendants and facilitate plea bargaining and the efficient and just disposition of criminal cases. To overrule ***Harrison*** and find that non-binding plea recommendations are categorically impermissible – as appellant requests – would deprive both defendants and the prosecution of a viable plea alternative – an alternative that has been long recognized by the federal courts – and an alternative which may help defendants reach a resolution of the charges against them without compelling them to a public trial which they, for whatever reason, may wish to avoid.

D. Appellant knew and understood the consequences of the agreement she made.

As just discussed, non-binding sentencing recommendations are permissible and useful options that can be used in reaching plea agreements, and are fair and equitable as long as the defendant knows and understands the non-binding nature of the term to which he or she is agreeing.

In the present case, appellant now concedes that she was given sufficient warning of the nature and consequences of her agreement, pursuant to ***Harrison, supra***, and ***Good, supra***. (App.Br. 38, 44-45). Appellant does go on, however, to argue that she believed the recommendation would be followed, that her belief was reasonable, that she was "lulled into believes that these words [the warnings] are only part of the drill." (App.Br. 46), and that she did not truly understand the ramifications. Essentially, this is a claim that she pled guilty based on a mistaken belief on what her sentence would be.

When an appellant claims to have pled guilty based on a mistaken belief about his or her sentence, the reviewing court looks to see whether there is a reasonable basis in the record for such a belief. ***Cope v. State***, 989 S.W.2d 265, 266 (Mo.App.E.D. 1999). Only when it appears that appellant's belief is based on positive representations on which he or she is entitled to rely will reviewing court's rule that the appellant's mistake was reasonable. ***Id.*** While an individual may proclaim she had a certain belief and may even have subjectively believed it, relief will not be granted if it was unreasonable for her to entertain such a belief at the time of the plea hearing. ***Krider v. State***, 44 S.W.3d 850, 857 (Mo.App.W.D. 2001); ***see also Johnson v. State***, 921 S.W.2d 48, 50-51 (Mo.App.W.D. 1996). Where, in light of the guilty plea record, there is no reasonable basis for the movant's belief, movant is not entitled to relief. ***Krider, supra.***

Moreover, "a plea does not become involuntary because a movant expects a lighter sentence." ***Id.*** "Further, a mere prediction or advice of counsel does not constitute legal coercion nor render a guilty plea involuntary." ***Id.; White v. State***, 954 S.W.2d 703, 706 (Mo.App.W.D. 1997).

In ***Bauer v. State***, 949 S.W.2d 248, 249 (Mo.App.S.D. 1997), the defendant argued that he made his guilty plea under the belief that he would receive probation after only serving 120 days, as opposed to the seven year sentence he received. The Court of Appeals, Southern District, rejected his claim, noting that expectation of a lighter sentence than actually received does not make a plea involuntary. ***Id.*** The court also noted that appellant was only told that they would request 120-day callback and that appellant was fully aware that the 120 day call back was discretionary with the court. ***Id.*** at 250.

In ***Stevens v. State***, 770 S.W.2d 496, 497 (Mo.App.E.D. 1989), the defendant contended that his plea counsel was ineffective, in part, because he had advised Stevens that he would receive probation

if he pled guilty. The court of appeals found that any belief Stevens had that he was guaranteed probation "was unreasonable because he was clearly disabused of this by the guilty plea court's thorough explanation of the range of punishment and its power to grant whatever sentence or probation it believed proper." ***See also Lewis v. State***, 880 S.W.2d 339 (Mo.App.S.D. 1994) (appellant claimed he relied on counsel's representations that he would get probation); ***Grayse v. State***, 817 S.W.2d 640, 642 (Mo.App.S.D. 1991) (appellant claimed he relied on counsel's advise as to the probability of a lenient sentence).

In the present case, the record belies appellant's assertions that she did not know there was a chance the court might not follow the recommendations of the plea agreement. Appellant understood that the court would decide whether to give her probation or not (LF 30). At the time of her plea, appellant stated that she understood that the trial court was not bound by the plea agreement, did not have to accept or honor the plea bargain, and could assess a punishment greater or less than the plea bargain agreement (LF 19, 31). Appellant understood that the plea bargain was only a recommendation and that she did not have a right to withdraw her guilty plea if the trial court did not accept it or did not give appellant probation as argued for by counsel (LF 19, 31).

At sentencing, appellant indicated that she understood that the plea agreement, as stated by the prosecutor, would be the state's recommendation and that it was only a recommendation (LF 47). Appellant understood that the Court was not bound by the recommendation and could impose a greater or lesser sentence than that recommended by the prosecutor (LF 48). Appellant also understood that if the Court did not follow the recommendation, she would not be allowed to withdraw her guilty plea (LF 48). Appellant understood that the trial court had the option of bringing her back after 120 days of

incarceration but did not have to exercise that option (LF 64). Appellant said that she wished to continue with her guilty plea (LF 48).

At the evidentiary hearing, appellant admitted that her counsel had told her that the plea arrangement was not binding on the court and that no one had the authority to bind the court to bringing her back after 120-days and giving her probation (Tr. 53). She also admitted being aware that if the court opted not to follow the 120-day call-back recommendation, she would not be allowed to withdraw her plea (Tr. 53). Appellant admitted that counsel had told her that the judge did not have to follow the 120-day recommendation and that she could not withdraw her plea (Tr. 56).

Furthermore, appellant's plea counsel testified that he had explained to appellant that ultimately it would be up to the judge what sentence she served (Tr. 11). And while plea counsel told appellant that he thought it likely that the court would go along with the state's recommendation, counsel also stated that he did not quantify the chances, and never guaranteed appellant that she would get the plea bargain, and never represented that what he felt likely to happen would, in fact, happen (Tr. 25-26).

In the present case, appellant's real complaint is that she did not get the sentence she hoped for, probation. The record amply indicates that appellant was informed and understood that it was discretionary with the trial court as to whether she would get the 120-day callback probation. Her attorney did nothing more than make a prediction when he said he believed that the trial court would follow the state's recommendation and give her the 120-day callback. As noted above, Missouri caselaw is clear that a mere prediction or advice of counsel does not constitute legal coercion nor render a guilty plea involuntary. ***White v. State***, 954 S.W.2d 703, 706 (Mo.App.W.D. 1997).

Ultimately, appellant's claim fails because as the record at the plea and sentencing hearing demonstrates, and as she herself admits, she knew that the trial court did not have to follow the terms of the plea agreement and give her 120-day callback. There is no evidence that her counsel or anyone else ever promised her she would receive the 120-day callback and while appellant is disappointed, to say the least, that she did not receive the lenient sentence for which she hoped, this fact alone does not establish that her plea was not involuntary. Nor has appellant presented any evidence demonstrating that counsel was ineffective for recommending that appellant take the plea under the circumstances. Appellant's claim is without merit and should be denied.

II.

THE MOTION COURT DID NOT ERR IN OVERRULING APPELLANT'S RULE 24.035 MOTION, IN WHICH SHE ALLEGED THAT COUNSEL WAS INEFFECTIVE FOR FAILING TO OBJECT WHEN THE COURT SENTENCED HER ON ALL FIVE COUNTS, INSTEAD OF DEFERRING SENTENCING ON THE CLASS A FELONIES, BECAUSE THERE WAS NO MERITORIOUS OBJECTION FOR COUNSEL TO MAKE IN THAT THE DEFERRED SENTENCING WAS ONLY A RECOMMENDATION AND WAS ONLY NECESSARY IF THE TRIAL COURT PLANNED TO GIVE APPELLANT PROBATION, AND THE TRIAL COURT WAS WITHIN ITS DISCRETION TO REJECT THIS RECOMMENDATION AND SENTENCE APPELLANT, INSTEAD OF GIVING HER PROBATION.

APPELLANT'S OTHER ARGUMENTS - - THAT THE TRIAL COURT SHOULD HAVE ALLOWED HER TO WITHDRAW HER PLEA WHEN IT DECIDED NOT TO DEFER SENTENCING – WAS NOT RAISED IN APPELLANT'S RULE 24.035 MOTION AND IS THEREFORE WAIVED. IN ANY EVENT, THE TRIAL COURT WAS UNDER NO OBLIGATION TO ALLOW APPELLANT TO WITHDRAW HER PLEA BECAUSE IT DID NOT ALTER THE TERMS OF THE PLEA AGREEMENT BY SENTENCING HER ON ALL COUNTS IN THAT DEFERRING SENTENCING ON THE STATUTORY RAPE AND SODOMY CHARGES WAS CONTINGENT UPON THE COURT GRANTING HER 120-DAY SHOCK PROBATION.

Appellant raises two points in her second point. She claims (1) that the trial court should have let her withdraw her plea when the court determined it would not defer sentencing on the statutory rape and sodomy charges and (2) that her attorney was ineffective for failing to object when the trial court sentenced her on all five counts, instead of just on the class D felonies of endangering the welfare of a child.

A. Standard of Review.

Appellate review of the denial of a post-conviction motion is limited to the determination of whether the findings of fact and conclusions of law are "clearly erroneous." ***State v. Tokar***, 918 S.W.2d 753, 761 (Mo. banc 1996), *cert. denied* 117 S.Ct. 307 (1996); Supreme Court Rule 24.035(k). Findings of fact and conclusions of law are clearly erroneous only if, after a review of the entire record, the court is left with the definite and firm impression that a mistake has been made. ***State v. Taylor***, 929 S.W.2d 209, 224 (Mo. banc 1996), *cert. denied* 117 S.Ct. 1088 (1997). On review, the motion court's findings and conclusions are presumptively correct. ***Wilson v. State***, 813 S.W.2d 833, 835 (Mo. banc 1991).

To show ineffective assistance of counsel, appellant must show that his counsel "failed to exercise the customary skill and diligence that a reasonably competent attorney would perform under similar circumstances," ***Strickland v. Washington***, 466 U.S. 668, 689, 104 S.Ct. 2052, 2065, 80 L.Ed.2d 674 (1984), and that he was prejudiced by his counsel's failure to competently perform. ***Id.*** Prejudice exists when there is a reasonable probability that, but for counsel's ineffectiveness, the result would have been different. ***Strickland,*** 466 U.S. at 694, 104 S.Ct. at 2068. Where a defendant pleads guilty, claims of ineffective assistance of counsel are only relevant as they affect the voluntariness and understanding with which the plea was made. ***Hicks v. State***, 918 S.W.2d 385, 386 (Mo.App. E.D. 1996).

B. Facts.

The original plea agreement in this case was that in exchange for her plea, the state would recommend sentences of 17 years on the statutory rape and sodomy charges and 3 years on the endangering the welfare of a child counts and would recommend that appellant be given probation after 120 days incarceration under the terms of §559.115, RSMo 2000. The attorneys later learned, however, that appellant could not be eligible for the 120 day call-back provision under §559.115.5 for the statutory rape and statutory sodomy charges. The plea agreement was then altered so that the state would recommend that appellant be sentenced only on the endangering the welfare of a child counts, that the state would recommend that appellant receive three years for those counts, but that appellant be called back after 120 days and granted probation under §559.115, and that sentencing on the other counts would be deferred until appellant was called back after 120 days. The state would further recommend that when appellant was called back, the court would then sentence her on the statutory rape and statutory sodomy charges, giving her sentences of seventeen years on each of them, but suspending execution of the sentences and granting her probation.

Appellant understood that the court would assess the punishment (LF 19). Appellant understood that the terms of the plea bargain were 17 years on each of the sodomy counts and the rape counts, said sentences to run concurrently with each other, and three years on the endangering the welfare of a child counts, said sentences to run concurrently with each other, but consecutive to the 17 year sentences (LF 19, 30). Appellant understood that the prosecutor would recommend a 120 day callback provision and that defense counsel would argue for probation (LF 19, 30-31). Appellant understood that the court would decide whether to give her probation or not (LF 30). Appellant understood that the trial court was not bound by the plea agreement, did not have to accept or honor the plea agreement, and could assess a

punishment greater or less than the plea bargain agreement (LF 19, 31). Appellant understood that the plea agreement was only a recommendation and that she did not have a right to withdraw her guilty plea if the trial court did not accept it or did not give appellant probation as argued for by counsel (LF 19, 31).

At the sentencing hearing, the state's recommendation was that appellant be sentenced only on the endangering counts, that appellant be sentenced to concurrent sentences of three years on those charges, and appellant be given 120-day shock probation on those counts under §559.115 (LF 46, 106). The state said that if the Court did recall appellant, the state would recommend straight probation on the statutory rape and sodomy charges, backed up by sentences of 17 years concurrent on the statutory rape and sodomy charges (LF 46, 47; Tr. 39). Appellant indicated that she understood that that would be the state's recommendation and that it was only a recommendation (LF 47). Appellant understood that the Court was not bound by the recommendation and could impose a greater or lesser sentence than that recommended by the prosecutor (LF 48). Appellant also understood that if the Court did not follow the recommendation, she would not be allowed to withdraw her guilty plea (LF 48). Appellant said that she wished to continue with her guilty plea (LF 48). Appellant understood that the trial court had the option of bringing her back after 120 days of incarceration but did not have to exercise that option (LF 64).

The trial court ruled that it did not feel that a 120-day call back or probation was appropriate under the circumstances of the case (LF 102). The trial court sentenced appellant to seventeen years on each of the statutory sodomy counts and on the rape count, and two three years on each of the endangering the welfare of a child count (LF 4, 21-24, 102-103). The seventeen year prison sentences were run concurrently to each other, and the three year sentences were run concurrently with each other, but consecutively to the 17 year sentences (LF 5, 21-24).

Defense counsel observed that it had been the recommendation of the state that appellant be sentenced that day only on the endangering the welfare of a child counts, and that she then be returned for a decision regarding the seventeen-year sentences on the other charges (LF 106). Defense counsel was concerned that if the court did not follow these recommendations, the court would not have the authority to bring appellant back before it, and she would have to serve 85 percent of her sentence before being eligible for parole (LF 106). The court observed that the 85% rule did not apply to statutory sodomy or rape convictions and that the normal probation and parole guidelines applied (LF 106). After sentencing, appellant still stated that she had no complaints about counsel's services (LF 105).

An evidentiary hearing was held on appellant's Rule 24.035 motion, at which appellant's plea counsel, Martin Warhurst, testified (Tr. 7, *et seq.*). Warhurst knew that the state's plea offer was not binding on the court (Tr. 10). Warhurst discussed the plea offer on several occasions with appellant (Tr. 11). Warhurst explained that the prosecutor would recommend the 120-day call back on the 20-year sentence, but ultimately it would be up to the judge what sentence she served (Tr. 11). Warhurst never guaranteed appellant that she would get the plea bargain (Tr. 25-26). Warhurst never represented that what he felt likely to happen would, in fact, happen (Tr. 26).

C. Analysis.

Appellant asserts that counsel was ineffective for failing to object when the trial court sentenced appellant on all five counts instead of just the two Class D felonies. Counsel was not ineffective because there was no meritorious objection counsel could have made, in that the trial court was free to act as it did.

Defense counsel had no grounds to object because the sentencing recommendations in the case at bar were non-binding and the trial court was free to accept or reject the recommendations as it saw fit.

In the case of non-binding recommendations, the trial court is not obligated to allow a defendant to revoke his plea if the trial court should opt not to follow the recommendation. ***Stufflebean v. State***, 986 S.W.2d 189, 193 (Mo.App.W.D. 1999)**,** ***Harrison v. State***, 903 S.W.2d 206 (Mo.App.W.D. 1995). The record repeatedly reflects that all parties understood the sentencing recommendations to be non-binding recommendations (LF 19, 31, 47, 48; Tr. 10, 53, 56). Included in this understanding was the fact that the possible deferred sentencing was a mere recommendation, just as the 120-day callback provision and the length of the sentences were. Defense counsel himself acknowledged that it was a mere recommendation when he reminded the court that "it was the *recommendation* of the State that she be sentenced today only on Counts IV and V, and that she be returned for a decision as to whether the sentence on the seventeen years." (LF 106) (emphasis added). Even the postconviction motion points out that "although the Court rejected the *suggestion* of the 120 day call back program, it followed the terms of the State's *other recommendations* exactly (LF 127) (emphasis added), as it was free to do (LF 19, 31, 47, 48; Tr. 10, 53, 56).

Secondly, the possible deferred sentencing was contingent upon the court deciding to grant appellant 120-day callback on the class D felonies. In fact, the *only* reason the deferred sentencing recommendation was made was in order that appellant might have the possibility of doing 120-day shock incarceration, followed by probation. Appellant was prepared to walk into court and plead guilty without a deferred sentencing provision; the only reason it was added was in order to accommodate the statutory bar against granting 120-day shock probation on a statutory rape or sodomy charge. As defense counsel himself testified at the evidentiary hearing, the initial plea offer was 17 years on each of the more serious felonies and three years on each of the class D felonies (Tr. 9). The prosecutor would recommend 120-

day call back (Tr. 10). However, according to defense counsel, immediately prior to entering the plea, they learned that appellant could not receive 120-day call back on the class A felonies (Tr. 12-13). Section 559.115.5 prohibits using the 120-day callback provision for persons convicted of statutory rape or statutory sodomy. Defense counsel said that they then restructured the offer and this was explained to appellant (Tr. 13-14).

At the sentencing hearing, the prosecutor explained the plea agreement as follows:

> Your Honor, the State agreed to recommend the sentence of thee years on each of the two Class D felonies, and that those sentences run concurrently, and that she be committed and serve those under the 120-day rule with the Court reserving jurisdiction under Section 559.115.
>
> In addition, that *if the Court does that*, she,– if the Court does recall her or whatever happens – she would eventually be sentenced to 17 years consecutive for the statutory rape and the statutory sodomy . . . charges.

(LF 46) (emphasis added). The state also said that *assuming* the trial court called appellant back, they would recommend straight probation on the longer sentences (LF 47). Appellant indicated that she understood that that would be the state's recommendation, that it was only a recommendation, that the court was not bound by the recommendation, and that if the court did not follow that recommendation, she would not be allowed to withdraw her guilty plea (LF 31, 47-48).

The record thus reflects that the deferred sentencing was contingent upon the court deciding it would use the 120-day callback rule, which everyone, including appellant, understood was completely within the court's discretion and that, if the court did not accept all of the state's recommendations, there

would be no grounds for withdrawing the plea. Put another way, the court did not have to decide to call back appellant after 120-days incarceration and place her on probation. If the trial court knew, as it obviously did, on the day of sentencing that it had no intention of calling appellant back and granting her probation, there was no reason to delay sentencing on the class A charges as well. Thus, since the terms of the plea agreement always contemplated that delayed sentencing on the statutory rape and sodomy charges would be contingent, there was no meritorious objection for counsel to make.

Appellant also asserts that the trial court "altered" the terms of the plea agreement because it sentenced her right away on all five counts instead of just on the two class D felonies, and deferring sentencing on the statutory rape and statutory sodomy charges. She cites to Supreme Court Rule 24.02(d)(4) which states that if the trial court rejects a plea agreement, it shall allow the defendant to withdraw his or her plea. She further tries to argue that while she knew that she could not withdraw her guilty plea if the trial court did not grant her the 120-day callback and the probation for the other counts, no one ever specifically informed her that the alleged agreement to delay sentencing was not binding on the Court.

This claim was not raised in appellant's Rule 24.035 motion. The claim in appellant's motion was that counsel was ineffective for failing to timely object to the court's sentencing on the more serious felonies and for failing to timely clarify for the Court that appellant's plea agreement was allegedly that she be sentenced first on the Class D felonies (LF 124). In her motion, appellant argues that the record reflects that she only anticipated sentencing on the two D felonies and that she was prejudiced because she did not have the opportunity to rediscuss with the state her sentences on the more serious felonies. Appellant also pled that her plea was unknowing, unintelligent, and involuntary because she allegedly never knew that the

court had the discretion to sentence her on all counts although she admits knowing that the court did not have to follow the sentence recommendations (LF 128).

Appellant never pled that the trial court should have let her withdraw her plea because the court allegedly was not going to follow the plea agreement. "Claims which were not presented to the motion court cannot be raised for the first time on appeal." ***Amrine v. State***, 785 S.W.2d 531, 535 (Mo. banc 1990), *cert. denied* 498 U.S. 881 (1990); ***State v. Clay***, 975 S.W.2d 121, 144 (Mo.banc 1998), *cert. denied* 525 U.S. 1085 (1999). "Grounds for relief not listed in the post-conviction motions are waived." ***Yoakum v. State***, 849 S.W.2d 685, 689 (Mo.App. W.D. 1993). This Court should not review any claim that the trial court should have allowed appellant to withdraw her plea.

In any event, the claim is without merit because, as explained above, the trial court did not alter the terms of the plea agreement by not deferring sentencing on the statutory rape and sodomy charges because it was always contemplated within the terms of that agreement that such a delay in sentencing would have been contingent upon the court granting appellant 120-day shock probation.

Appellant asserts that implicit in the agreement was that if the court chose not to sentence appellant to the 120-day callback program, "the State and the defense would have further discussions regarding the State's recommendations" on the statutory rape and statutory sodomy counts (App.Br. 61). Respondent is not aware of any evidence in the record that indicates whatsoever that the State and defense counsel ever intended to have "further discussions" regarding the State's recommendations. Furthermore, the record reflects that there would be no reason for further discussions since it was made perfectly clear at the plea hearing and the sentencing hearing that the state would recommend probation on the statutory rape and sodomy counts backed up by sentences of 17 years (PCRLF 30, 46-47).

Finally, appellant cites to ***Good v. State***, 979 S.W.2d 196 (Mo.App.W.D. 1998), wherein the Court of Appeals, Western District, held that the plea court erred in not personally instructing the defendant at the time of her guilty plea that she would not be permitted to withdraw her plea of guilty if the court opted not to follow the state's recommendation for 120-day callback. Appellant argues that ***Good*** "demonstrates how important it is that each individual defendant understand the court's obligations with respect to his or her nonbinding plea agreement."

Good does not assist appellant. First of all, the reason for the reversal in ***Good*** was because in that case, defense counsel told the defendant that while the law was that she would not be able to withdraw her plea, the circuit courts "uniformly" allowed a defendant to withdraw her plea if, for any reason, the court did not follow the terms of the plea agreement. ***Good, supra*** at 199. Defense counsel in ***Good*** essentially misrepresented how the law applied to the defendant's situation by informing her that, notwithstanding the law, she would be allowed to withdraw her plea.

In the present case, there is nothing in the record to indicate that the law was misrepresented to appellant. The record reflects that appellant knew the state's recommendations were non-binding.

In sum, then the motion court did not clearly err in overruling appellant's Rule 24.035 motion counsel was not ineffective in failing to object when the court sentenced appellant on all five counts because there was no objection to be made in that the trial court acted within its discretion in declining to give appellant probation and the sentence deferral recommendation was relevant only if the court were going to grant appellant probation. Appellant's claim is without merit and should be denied.

CONCLUSION

In view of the foregoing, respondent submits that the denial of appellant's Rule 24.035 motion be affirmed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE AND SERVICE

I hereby certify:

1. That the attached brief complies with the limitations contained in Supreme Court Rule 84.06(b) of this Court and contains _____words, excluding the cover, this certification and the appendix, as determined by WordPerfect 6 software; and

2. That the floppy disk filed with this brief, containing a copy of this brief, has been scanned for viruses and is virus-free; and

3. That a true and correct copy of the attached brief, and a floppy disk containing a copy of this brief, were mailed, postage prepaid, this ____ day of December, 2002.

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_____

IN THE
MISSOURI SUPREME COURT

_____

SHERYL WYRECK-HAAKE,

Appellant,

v.

STATE OF MISSOURI,

Respondent.

_____

Appeal from the Circuit Court of Ray County, Missouri
The Honorable Werner A. Moentmann, Judge

_____

RESPONDENT'S APPENDIX

_____